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In The
SUPREME COURT OF THE UNITED STATES
October Term 1964.

No. 364

MRS. MARY VIRGINIA BELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN WARE BELL, DECEASED.
Petitioner,
v.
TUG SHRIKE, IN REM, SOUTHERN TRANSPORTATION COMPANY, INCORPORATED, A CORPORATION AND SOUTHERN TUG CORPORATION, IN PERSONAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AND APPENDIX

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled admiralty cause on May 13, 1964.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth

Circuit, printed in Appendix hereto, pp. 15-28, is reported in 332 F. 2d 330. The Opinion of the District Court, printed in the Appendix hereto, pp. 29-37, is reported in 215 F. Supp. 377.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Where uniformity of shipowner's liability to a seaman's dependent widow was intended by Congress in the Jones Act, 46 U.S.C. 688, should the marriage statutes of the State of Virginia be applied in Admiralty to nullify uniformity, by denying and divesting a common law widow, not recognized by the State of Virginia, of her federally given rights as the surviving dependent widow under the Jones Act.

STATUTES INVOLVED

The statutory provisions involved are the Jones Act, 46 U.S.C. 688, incorporating by its express terms the Federal Employers' Liability Act, 45 U.S.C. 51. They are printed in the Appendix, pp. 38-39.

STATEMENT OF THE CASE

Mrs. Mary Virginia Bell as widow and administratrix of the estate of her husband, John Ware Bell, deceased,

filed her Libel in Admiralty under the Jones Act, 46 U.S.C. 688, seeking to recover damages for the wrongful death of her husband, a member of crew of respondent's tug "SHRIKE" when the vessel capsized and sank in the Chesapeake Bay on September 12, 1959. The respondent shipowner on the morning of trial settled its liability for causing the death of Bell in the sum of Sixty Thousand ($60,000.00) Dollars of which sum $15,500.00 was distributed to the children of the decedent by his first wife, and the remaining $44,500.00 was granted to Mrs. Mary Virginia Bell, the petitioner here, payment conditioned upon her showing of entitlement as the surviving widow under the terms of the Jones Act. If it was determined that she was not the surviving Jones Act widow then the $44,500.00 settlement was to be retained by the shipowner, there being no other claimant as Bell's widow.

Petitioner, Bell having been separated from her first husband and living apart for some twelve years obtained a divorce from him in April of 1956. On December 13, 1956, she and the decedent John Ware Bell obtained a marriage license in Mathews County, Virginia, and were ceremoniously married. After their marriage they came to live in Norfolk, Virginia, held themselves open to the community and the world to be legally husband and wife, bought a home in their joint names at 3300 Montana Avenue, Norfolk, Virginia, paid their taxes in the name of Mr. and Mrs. John Bell and were known in the community as Mr. and Mrs. Bell. Widow Bell's daughter by her first marriage, Mrs. Ruth Altimus, was living with her mother in 1956 when her mother married the decedent Bell and continued to live with Mr. and Mrs. Bell after their marriage. Both she and her mother believed that the petitioner was legally married to the deceased Bell. Prior to

their marriage Mrs. Bell ran her home as a rooming house and Mr. Bell stayed there occasionally having known Mrs. Bell's son who worked on the same boat, through whom he met the petitioner.

The decedent John Ware Bell was first married to Helen Woolard Bell by whom he had three children and was divorced on June 12, 1951. He was separated from this wife prior to the divorce, and one week after the final decree of divorce he married Catherine Estal Smith on June 19, 1951. He lived with Catherine until January 15, 1954, on which date while living in the City of Portsmouth, Virginia, he left Catherine who thereafter filed a divorce complaint but was not granted a final divorce until September 18, 1957. Having been separated from second wife Catherine since January 15, 1954, the decedent Bell ceremoniously married the present widow petitioner Mary Virginia Bell on December 13, 1956, in Mathews County, Virginia, after they both had obtained a marriage license from the Clerk of Court. The decedent had told her of his first marriage in North Carolina and of the three children by that wife. He also told her that he had only once been previously married, to the North Carolina wife. Petitioner Bell stated that she knew of Catherine but the deceased denied being married to her. Widow Bell was totally dependent upon her husband throughout their marriage, from 1956 until the date of his death in 1959, and no other support contributions by the decedent were made to any other person. She is the sole and only surviving widow of John Ware Bell, the first two wives having secured their divorces before his death.

The District Court decided that decedent's marriage to petitioner in 1956 before the removal of the impediment

of Catherine's marriage to him by her final divorce in 1957 was defective. However, petitioner and decedent having lived together as husband and wife at common law, the District Court held that "the issue now before the Court is whether the libellant in her own right is entitled to recover as the alleged widow or common law wife of John Ware Bell. If she is entitled to recover, the remaining balance of said settlement is to be paid to her." (App. p. 30) The District Court having found that the State of Virginia does not recognize common law marriages, applied this state law to determine the status of the surviving widow beneficiary under the Jones Act. It held that the petitioner was not the surviving widow under that statute, and allowed the shipowner to retain the petitioner's agreed settlement of $44,500.00. The Court of Appeals affirmed, holding that state law governs the determination of beneficiaries under the Jones Act and an admiralty court has no choice of law to recognize a common law widow to prevent nullification of her federal rights.

REASONS FOR GRANTING THE WRIT

1. In the construction and application of the Jones Act, 46 U.S.C. 688, incorporating F.E.L.A., 45 U.S.C. 51, this case raises important federal statutory issues of conflicts, as to whether state law should determine the status of the widow beneficiary entitled to the federal grant or whether the admiralty court has a choice of law other than state law, to prevent state nullification of federal rights and carry out the congressional intent of uniform liability of shipowners to the dependent widow. The decision of the Court of Appeals conflicts in principle with the purposes and intent of the Jones Act and with the decisions of the Supreme Court.

The Court of Appeals held that state domestic relations law, varying in each of the 50 states, must be applied to determine widowhood status under the Jones Act, even though this allows state divestiture of a federal remedial grant where the widow fails to meet state statutory approbation. But this is not a domestic relations problem. Nor is it an inheritance situation. Congress specifically and purposefully avoided the heirship dilemma and benefitted the widow in her own right. See House Report 2335, 59th Congress First Session, of March 15, 1906. And a broad definition of widowhood for purposes of this Act would not affect the scope or requirements of state domestic relations law.

The beneficiary provision of the Jones Act is set forth in the incorporated F.E.L.A., 45 U.S.C. 51 (App. p. 38) enacted April 22, 1908, which in turn took the precise provision from the first Employers' Liability Act of June 11, 1906, c 3073, 34 Stat. 232, other provisions of which on being held unconstitutional, were corrected in passage of the present statute. From the 1906 statute the clear congressional intent in passage of these statutes is shown in House Report 2335, 59th Congress First Session, of March 15, 1906:

> Mr. Sterling:
>
> * * * and by this bill it is sought *to fix a uniform rule of liability* throughout the union with reference to common carriers engaged in this line of employment. (Emphasis added)
>
> * * *
>
> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they

> relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numoerus [sic] rules will be fixed by one rule in all the States.

See also, Congressional Record, April 2, 1906, at page 4602:

> Mr. Sterling: I think there is no doubt that this statute, within its scope, *would control the statutes of the several States.* That is one purpose of the bill, to have a uniform rule with reference to the employees engaged in interstate commerce. (Emphasis added)

And at page 4604:

> Mr. Driscoll: The power which creates the cause of action has the right to say how the proceeds shall be disposed of. They should not be subject to decedent's debts, but should go to the husband, wife, children, parents, brothers, sisters, and other next of kin; according to the pecuniary damages resulting to them from his death.

There can be no uniformity of liability if the states are free to define the objects of the express federal grant. Certainly the states could not define "railroad employee" so as to determine his status under the F.E.L.A. Similarly to allow the states to variously interpret and define "widow" is to allow them to *variously determine the liability per se.* To admit liability but refuse to allow a beneficiary to collect thereunder is to deny liability. There is no liability in the air. It can exist only between at least two parties.

The Jones Act is remedial welfare legislation, Cox v Roth, 348 U.S. 207, 75 S.Ct. 242, 99 L ed 260 (1955); Cosmopolitan Shipping Company v McAllister, 337 U.S. 783, 69 S.Ct. 1317, 93 L ed 1692 (1949). Uniform application throughout the country is necessary to effectuate its purposes and therefore state laws are not controlling in determining what the incidents of this federal right shall be. Panama Railroad Company v Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 68 L ed 748 (1924); Garrett v Moore McCormack Company, 317 U.S. 239, 63 S.Ct. 246, 87 L ed 239 (1952); Dice v Akron C & Y Ry. Co., 342 U.S. 359, 361, 72 S.Ct. 312, 96 L ed 398 (1952).

In providing the federal grant to the beneficiaries under Section 51 of F.E.L.A., 45 U.S.C., which is incorporated in the Jones Act, 46 U.S.C. 688, Congress specifically refrained from establishing any qualifications as to the class of widow; and it is apparent that by using the word "widow" without restricting its definition to state approved widows, Congress intended to include widows by any proper definition, including common law widows. How can it be maintained that they were not included as a class of widows together with state approved widows when no limitations or restricted meanings are expressed by the statute itself? Does not this carry out the congressional intent for uniform liability under the Act to all classes of widows?

Common law widows existed in many parts of the world including the United States at the time of the passage of the Statute as they do exist now.

In Meister v Moore, 96 U.S. 76, 78-79 (1877) this Court stated:

"That such a contract [per verba de praesenti] consti-

> tutes a marriage at common law there can be no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes, in many of the States, it is true, regulate the mode of entering into the contract, *but they do not confer the right* . . . (Emphasis added)

See also Travers v Reinhardt, 205 U.S. 423 (1907) (Harlan, J.), where just prior to passage in 1908 of F.E.L.A., 45 U.S.C. 51, this Court recognized the common law right of marriage:

> It is laid down by Blackstone that a marriage *per verba de praesenti*, without the intervention of a clergyman, is a legitimate marriage. And both Story and Kent say that, according to the universal understanding in this country, a marriage *per verba de praesenti*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage.

According to the common law of England existing in the Colonies at the time of the American Revolution, consensual marriages—i.e., marriages resting simply on consent per verba de praesenti, were valid marriages. Wharton Confl. L., Sec. 171-173, as they were also valid in the old Roman Empire down to the Council of Trent. 3 Maitland, Select History, p. 810. See also 2 Kent, Commentaries on American Law (5th Ed. 1840), 86-88; Fenton v Reed, 4 Johns. R. 52 (N.Y. 1809) (citing English cases); Town of Londenberry v Town of Chester, 2 N.H. 268 (1820) (citing English cases); State v Murphy, 6 Ala. 765 (1844) (citing English cases); 22 Modern L. Rev. 396 (1959).

It is clear that both the decedent and petitioner widow Bell intended and attempted to be married under the laws of the State of Virginia since they secured a marriage license from the Clerk of Court of Mathews County, Virginia, where petitioner's home was, and they were ceremoniously married by a clergyman on December 13, 1956. The impediment to their valid marriage under Virginia statutes was removed on September 18, 1957, when decedent's wife Catherine secured her final decree from the decedent after being separated from him since January 15, 1954. Petitioner did not know of this marriage or this divorce. If she had known of this impediment she could have and would have remarried in ceremony, to avoid invalidity of her marriage under Virginia law. After the removal of the impediment of Catherine's marriage on September 18, 1957, until the death of the decedent on September 12, 1959, the parties continued their good faith marriage as husband and wife and the conjugal nexus was broken only by death. Both the District Court and the Court of Appeals regarded the parties married as at common law from the date of removal of the impediment until decedent's death some two years later. Upon the removal of the impediment and continued good faith cohabitation as husband and wife, a common law marriage is deemed in law to exist, since marriage is preferable to concubinage. Thomas v Murphy, 107 F.2d 268, (D.C. Cir. 1939), Thomey v Thomey, 181 P.2d 777 (Sup. Ct. Idaho 1947); Hess v Hess, 176 P.2d 805 (Sup. Ct. Okla., 1947); Prince v Edwards, 175 Ala. 532, 57 So. 714 (1912); Rocky Mountain Fuel Co. v Reed, 110 Colo. 88, 130 P.2d 1049 (1942); Utterback v Utterback, 71 F.Supp. 231 (D.DC 1947); LeBlanc v Vawn 99 Fla. 328, 126 So. 789 (1930); Smith v Reed, 145 Ga. 724, 89 S.E. 815 (1916); Lee v Lee, 150 Iowa 611, 130 N.W. 128 (1911); Haywood v. Nichols, 99 Kan. 138, 160 Pac.

982 (1916); Morrison v Sunshine Mining Co., 64 Idaho 6, 127 P.2d 776 (1942); Johnson v Wolford, 117 Ohio St. 136, 157 N.E. 385 (1927); Mudd v Perry, 108 Okla. 168, 235 Pac. 479 (1925); Holgate v United Electric Ry., 47 R.I. 337, 133 Atl. 243 (1926); David v Whittock, 90 S.C. 233, 73 S.E. 171 (1911).

Their marriage could not be meretricious since their intent to enter into a legal and honorable state of matrimony is evidenced by their public act of securing a Virginia marriage license and being ceremoniously married. Re Hoffner's Estate, 254 N.Y. 238, 172 N.E. 483 (1930).

There can be no question under the facts of this case that petitioner Bell and the decedent had a valid common law marriage, and at his death, petitioner Bell was and is his common law widow.

2. It is believed that the decision below of the Court of Appeals is erroneous in failing to hold that the congressional intent in passing the Jones Act making this grant to the widow in the broadest sense of the word included all classes of widows, common law widows and statutory widows alike, and in further failing to hold that plaintiff had a choice to recognize decedent's common law widow, petitioner Bell, and thereby carry out the intent of the remedial grant by Congress. The lower Court's view of Seaboard Air Line v Kenney, 240 U.S. 489 (1916), as restricting the choice to state qualifications is erroneous. In Kenney it was claimed that the words "next of kin" were limited to their common law significance, and could not be expanded by state interpretation in order to accomplish the beneficent purposes of F.E.L.A. This Court held that a state interpretation which broadened the term

"next of kin" beyond its common law significance to include illegitimates was permissible, since it enlarged the scope of the remedy and no restriction of characterization was expressed by Congress in the Act. But while the Kenney case permitted states to enlarge the scope of the federal remedy, it was used as authority below to allow a state restriction thereof. Not only is Kenney no authority for permissive state restriction, it is clearly no support for mandatory state pre-emption of federal statutory interpretation. Both the letter and the spirit of the Kenney decision are violated by interpretations denying Wide Bell's status. There was also a misapplication below of this Court's decision in DeSylva v Ballentine, 351 U.S. 570 (1956). While DeSylva stood for permissive state broadening of the scope of a federal remedy, it was used as authority by the Court of Appeals as a mandate for restriction. Moreover, in DeSylva, Justice Douglas and Justice Black in their concurring opinion felt that it was not necessary to rely upon a state enlargement at all, as the statute itself generates definitive scope concomitant with its purpose, stating, 351 U.S. 571, 583-84:

> But I would think the statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty-eight states.
>
> * * *
>
> The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making pro-

vision for the support of those who might otherwise become dependent.

Petitioner Bell, then, is a common law widow. The Jones Act grants a remedy to a widow. But here state definitions were improperly used to restrict the scope of liability under the federal statute, and Mrs. Bell has been deprived of her grant.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SIDNEY H. KELSEY
Counsel for Petitioner

July 31, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9178.

Mrs. Mary Virginia Bell, individually and as administratrix of the Estate of John Ware Bell, Deceased,

Appellant,

versus

Tug SHRIKE, in rem, Southern Transportation Company, Incorporated, a corporation, and Southern Tug Corporation, in personam,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued January 15, 1964. Decided May 13, 1964.)

Before SOBELOFF, Chief Judge, J. SPENCER BELL, Circuit Judge, and BARKSDALE, District Judge.

Sidney H. Kelsey for Appellant, and Roy L. Sykes (R. Arthur Jett, Jr., and Jett, Sykes & Berkley on brief) for Appellees.

SOBELOFF, Chief Judge:

The Jones Act suit brought by Mrs. Mary Virginia Bell for the death of John Ware Bell, a seaman, was settled before trial for an agreed sum; yet this further litigation has been necessary to resolve the validity of her claim as John Ware Bell's "surviving widow."[1] There was and is no problem of competing claimants. The sole issue is whether the District Court properly concluded that Virginia state law applies, and that since, according to that law, she was not legally married to the decedent at the time of his death, she was therefore not his lawful widow entitled to the settlement. Stated differently, this appeal focuses upon the troublesome problem as to whether a federal court sitting in admiralty should be governed by the normally-applicable state domestic relations law, or by some other rule which the court may fashion.

It is undisputed that John Ware Bell was married on three different occasions in the course of his lifetime. First, he contracted a marriage in 1940, which was dissolved by divorce in June, 1951. He entered into his second marriage one week later, but he and his second wife were separated in 1954 and this marriage also was ended by divorce, on September 18, 1957. At issue in this case is a ceremonial marriage of the seaman to the appellant in Mathews County, Virginia, on December 13, 1956, when he was

[1] The Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 (1958), renders a carrier liable to the decedent's "personal representative, for the benefit of the surviving widow * * *" and other listed beneficiaries. This provision has been specifically incorporated into the Jones Act, Merchant Marine Act, 46 U.S.C.A., Sec. 688 (1958). See, e.g., Norris, THE LAW OF SEAMEN, Sec. 668, 669 (2d ed. 1962); Gilmore & Black, THE LAW OF ADMIRALTY Sec. 6-29 (1957).

still legally married to the second wife. Between the date of the last mentioned marriage and September 12, 1959, when the Tug SHRIKE capsized in the Chesapeake Bay, causing John Ware Bell's death, he and the appellant lived together in Norfolk, Virginia, and held themselves out to the community as husband and wife. Because of the nature of their relationship, the appellant claims that she is entitled to recognition as the decedent's widow under the Jones Act.

After the appellant brought her action in the District Court as administratrix, a settlement was arranged between all parties concerned whereby the shipowner agreed to pay a total of $60,000, of which sum $15,500 was allotted to the children of the decedent by his first wife, and the remaining $44,500 to the appellant, provided she could establish her right to recover as Bell's widow under the terms of the Jones Act. If she failed in this, the $44,500 was to be retained by the shipowner, there being no other claimant as Bell's widow.

The appellant maintains that, although her marriage to Bell was bigamous, a valid common-law marriage was created once the impediment of the prior existing marriage was removed by divorce in 1957. The District Court disagreed, reasoning that because "(t)here is no admiralty law of domestic relations," a federal court sitting in admiralty must look to state law to define statutory beneficiaries under the Jones Act. Bell v Tug SHRIKE, 215 F. Supp. 377, 381 (E.D. Va. 1963). Virginia law does not recognize common-law marriages.[2] On that basis the ap-

[2] The parties are in accord that, if state law is applicable, the appropriate law is that of Virginia and that under it the appellant's claim of a common-law marriage is without substance.

pellant was denied recognition as the surviving widow.[3]

Appellant contends, however, that state law should not have been applied because a federal court sitting in admiralty is not bound by the doctrine of Erie R.R. v Tompkins, 304 U.S. 64 (1938). Appellant maintains that admiralty has a choice of law and that, if the application of state law would undermine a federal right, the court should look to that law which will best effectuate admiralty principles and achieve the national uniformity that is desirable in this area. She urges that these fundamental principles would be better satisfied by accepting her as a common-law wife instead of depriving her of that status by resort to the domestic relations laws of Virginia.

Whether or not the Erie doctrine is limited to diversity cases or also governs where federal jurisdiction is grounded in admiralty is a matter very much in dispute.[4] Mr. Justice Black has commented that Erie "did not answer all questions * * *. For example * * * the extension of the doctrine to admiralty jurisdiction, and the total impact of the principle in cases other than those of diversity of citizenship have not yet been finally determined." 13 Mo.B.J. 173, 175

[3] The District Court was asked alternatively to treat the appellant as the decedent's "putative widow." This the court declined to do because it found on the evidence adduced that she knew of the prior existing marriage when she married the decedent and was thus disqualified from such treatment. No issue is pressed on this appeal that Mrs. Mary Virginia Bell is the putative widow.

[4] 1A Moore, FEDERAL PRACTICE Sec. 0.322(2) (1961); Currie, "Federalism and the Admiralty: 'The Devil's Own Mess,'" 1960 S.Ct. Rev. 158; Stevens, "ERIE R.R. v TOMPKINS AND THE UNIFORM GENERAL MARITIME LAW," 64 Harv. L. Rev. 246 (1950).

(1942). To our understanding this question is still unsettled. The Supreme Court appears to have adopted a flexible standard, applying in admiralty cases either maritime principles or state law, depending upon the nature of the case and the problems involved. The determining factor as to which law governs seems to be the availability of an admiralty rule which is generally accepted and clearly defined. Where such a rule exists it will prevail over conflicting local law, regardless of Erie; but where no admiralty rule has been clearly established, an admiralty court will, in the absence of legislation, hesitate to lay down a rule for uniform application in the face of conflicting possible choices.[5]

This approach is best exemplified by comparing Pope & Talbot, Inc. v Hawn, 346 U.S. 406 (1953), and Wilburn Boat Co. v Fireman's Fund Ins. Co., 348 U.S. 310 (1955). In the former the plaintiff asserted a claim for a maritime tort on the civil side of the District Court. There was a jury finding that he had been contributorily negligent. It was urged on appeal that this finding should bar recovery either on the theory that admiralty law, having no rule of its own on the subject, must look to the common law, or on the theory that the state rule on the subject controlled under the Erie doctrine. Mr. Justice Black, writing for himself and four colleagues, stated that "(t)he harsh rule of the common law (that recovery is barred by contributory negligence) is completely incompatible with modern admiralty practice and procedure." He therefore agreed that

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[5] See also Hess v United States, 361 U.S. 314 (1960); Levinson v Deupree, 345 U.S. 648 (1953); Isbrandtsen Co. v Johnson, 343 U.S. 779 (1952); Garrett v Moore-McCormack Co., 317 U.S. 239 (1942); Just v Chambers, 312 U.S. 383 (1941).

Cf. Baer, ADMIRALTY LAW OF THE SUPREME COURT 141-49 (1963).

the established "admiralty doctrine" of comparative negligence should be invoked. As to Erie, the basic principle, according to the Justice, was that plaintiff's rights should not be varied by his choice of forum. 346 U.S. at 410-11.

On the other hand, in Wilburn Boat Justice Black, speaking this time for six members of the Court, held that the problem of a breach of warranty in a maritime insurance policy was not the subject of an established federal maritime rule. Rather than delve into the "number of * * * possible rules from which this Court could fashion one for admiralty," 348 U.S. at 320, the Court remanded the case for application of the "appropriate state law."

Here too the appellant has been unable to direct us to any admiralty principle or maritime rule which could aid the court in determining the legality of her marital relationship. She merely points to the law of those states, other than Virginia, which recognize common-law marriage as a general family-law principle.[6] It would at best be illogical to disregard the state law which under accepted principles of conflicts of law would apply, merely because the law of some other place, unrelated to the parties and to the subject matter, happens to afford one in the appellant's position more favorable treatment.[7] If the Court, in the absence of

[6] The appellant states in her brief that common-law marriages are recognized if entered into today in the following states: Alabama, Alaska, Colorado, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas and District of Columbia. They are also recognized in the following if entered into before a specified date: California, Indiana, Michigan, Minnesota, Missouri, Mississippi, New Jersey, New York.

[7] For example, in the District of Columbia it has been suggested that a woman in the position of Mrs. Bell would be a valid common-law widow. Thomas v. Murphy, 107 F.2d 268, 269 (D.C. Cir. 1939).

an admiralty rule or policy, as to look to some source other than the law of Virginia, we think that it would have to be the American common law;[8] but to say that would really not contribute to a practical solution here, since the "common law" has been variously interpreted by judicial decision.

If we inquire into the law of marriage and divorce under "the law of England as it existed at the time of the separation from the mother country," Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 494 (1916), in an effort to discover a common law which might be applied, the result is no more favorable to appellant that the law of Virginia. According to Kent:

> "No person can marry while the former husband or wife is living * * * (and) the principle of the common law, not only of England, but generally of the Christian world, is, that no length of time or absence, and nothing but death, or the decree of a court confessedly competent to the case, can dissolve the marriage tie." 2 Kent, COMMENTARIES ON AMERICAN LAW 79-80 (14th ed. 1896).

And Blackstone, discussing the effect of a prior subsisting marriage, says:

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[8] Ours is not the typical "federal common law" case represented by Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), and Bank of America v. Parnell, 352 U.S. 29 (1956), nor has there been any argument that the court should treat it as such. Cf. Friendly, "In Praise of Erie—and of the New Federal Common Law," 39 Record of the Association of the Bar of the City of New York 63 (1964).

> "The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void * * *." 1 Blackstone, COMMENTARIES 402 (Lewis ed. 1922).[9]

A marriage void because of an existing marriage may in certain circumstances have been converted into a common-law marriage after removal of the impediment,[10] but this could not occur if both parties knew of the existence of the impediment and failed to enter into a new marriage contract after the disability had been removed.[11] Thus, the common law, if we have been able to discover it with any precision, does not advance the appellant's cause. Further, if admiralty does indeed favor uniformity, this end is no better achieved in cases like ours by looking to a federal judge's interpretation of the common law than by relying upon the domestic relations laws of the states in which the parties are domiciled.

Because we can perceive no controlling maritime or clear-cut common law rule, there is in fact no choice of law for an admiralty court to consider. The court must look to the Virginia law which normally governs the domestic rela-

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[9] See, e.g., Hantz v Sealy, 6 Binn. 6 (Pa.) 405, 408 (1807); 1 Bishop, ON MARRIAGE, DIVORCE, AND SEPARATION 310-13 (1891); Barry, "Till Death Us Do Part," 17 Va. L.Rev. 415, 429 (1930).

[10] Keezer, MARRIAGE AND DIVORCE 276-79 (3d ed. 1946); see, e.g., Fenton v Reed, 4 Johns. (N.Y.) 52 (1809). Cf. Tetterton v Arctic Tankers, Inc., 116 F.Supp. 429, 432 (E.D. Pa. 1953).

[11] Note, 21 Va. L.Rev. 331 (1934); Koegel, COMMON LAW MARRIAGE 153-60 (1922).

tions of its domiciliaries. Adopting this view, the admiralty court in no way abdicates its responsibility in appropriate circumstances to formulate its own law.[12]

The Supreme Court has declared that "there is no federal law of domestic relations," De Sylva v Ballentine, 351 U.S. 570 (1956), and the question is whether in the present circumstances admiralty should fashion a rule on the subject and, if so, from what sources shall the rule be drawn. In De Sylva v Ballentine the Court was similarly faced with the choice of making an independent formulation or relying on existing state law to determine whether an illegitimate son of an author is entitled, as one of the "children" mentioned in the Copyright Act, 17 U.S.C.A. Sec. 24, to succeed to the right of renewal. In deciding to follow state law, the Court said:

> "We come, then, to the question of whether an illegitimate child is included within the term 'children' as used in Sec. 24. The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal, law. Cf. Reconstruction Finance Corp. v Beaver County, 328 U.S. 204; Board of County Commissioners v United States, 308 U.S. 343, 351-52. This is especially true where a statute deals with a familial

[12] We are fully advertent to the statement of Mr. Justice Frankfurter in Mitchell v Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (dissenting opinion): "No area of federal law is judge-made at its source to such an extent as is the law of admiralty." Nor do we overlook the even more recent comment of Mr. Justice Black for the Court that "Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." Fitzgerald v United States Lines, Inc., 374 U.S. 16, 20 (1963).

relationship; there is no federal law of domestic relations; which is primarily a matter of state concern." 351 U.S. at 580.

Similar reasoning was employed in a Jones Act case, Beebe v Moormack Gulf Lines, Inc., 59 F.2d 319 (5th Cir.), cert. denied, 287 U.S. 597 (1932), where reliance was upon Louisiana law in interpreting the term "widow" in the federal statute, and in the interpretation of other federal statutes as well.[13]

More directly pertinent than these analogous statutes is the Federal Employers' Liability Act itself, which the Jones Act incorporates. Repeatedly questions involving domestic relations arising under that statute have been settled in accordance with state law. In Seaboard Air Line Ry. v Kenney, 240 U.S. 489 (1916),[14] it was stated:

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[13] Some of these statutes are listed in a footnote in Lawson v United States, 192 F.2d 479, 481 n.5 (2d Cir. 1951), cert. denied, 343 U.S. 904 (1952). To this list should be added the Railroad Retirement Act, 45 U.S.C.A., Sec. 228 e (b), Gloss v Railroad Retirement Bd., 313 F.2d 568 (D.C. Cir. 1962) (interpreting the statutory term "remarriage"); the World War Veterans Act, 38 U.S.C.A. Sec. 445, Live Stock Nat. Bank of Chicago v United States, 106 F.2d 240 (7th Cir. 1939) (involving validity of common-law marriage); the Social Security Act, 42 U.S.C.A., Sec. 402(e), Yeager v Flemming, 282 F2d 779 (5th Cir. 1960) (marital status of claimant upon annulment of "remarriage"); and the Internal Revenue laws, Helvering v Fuller, 310 U.S. 69 (1940) (status of parties and their property after a divorce).

[14] The appellant has argued that this case is not controlling because it was decided four years before the enactment of the Jones Act. We think the opposite is true. Congress specifically said that beneficiaries of that Act were to be determined by reference to "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees." 46 U.S.C.A., Sec. 688.

"There can now be no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under that act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action. * * * But this is irrelevant, since the controversy concerns only the meaning of the act which it is conceded, when rightly interpreted, is entitled to exclusive operation.

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law." 240 U.S. at 493-94.[15]

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[15] E.g., Poff v Pennsylvania R.R., 327 U.S. 399, 401 (1946); Pacheco v New York, N.H. & H.R.R., 15 Fed. 467, 469 (2d Cir 1926); Padgett v Padgett, 88 F.Supp. 630, 632 (S.D. Fla. 1950); Hammond v Pennsylvania R.R., 54 N.J. Super., 149 148 A.2d 515 (1959). We think that Dice v Akron, C & Y.R.R., 342 U.S. 359 (1952), cited by appellant, does not impair this authority. There the Court declined to follow state law on fraud in the obtention of a release from an FELA claim, a subject not as clearly committed to local law as domestic relations. Moreover, the Court was able to look to an established federal rule. See also Tune v L. & N.R.R., 223 F Supp. 928 (M.D. Tenn. 1963), where the court indicated, without deciding, that the meaning of the term "children" as used in the FELA is determined by state law. It held that under either state or federal law an illegitimate child was within the statutory category.

None of the cases cited by appellant refutes the essential holding of the Kenney case. In Middleton v Luckenbach S.S. Co., 70 F2d 326 (2d Cir.), cert. denied, 293 U.S. 577 (1934), the court could not logically apply any state law to interpret the Death on the High Seas Act, 46 U.S.C.A., Sec. 761-68 (1958), because the persons involved were subjects of the British West Indies, the lawsuit arose from a ship collision in the Caribbean, and the forum had no "substantial contact" with the transaction. Kenney was distinguished as arising under a separate statute, the FELA, which specifically provided for concurrent federal and state jurisdiction, a distinction which is inapplicable in the present case since the Jones Act incorporates FELA on the matter of beneficiaries.[16] The court concluded that, as a matter of general law, "the rule that a bastard is nullius filius applies only in cases of inheritance" and, because the statutory test of dependency was met, the illegitimate had standing. Nor is Thompson v Lawson, 347 U.S. 334 (1954), a case arising under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 902 (16), controlling. There also the Court found reference to state law unnecessary because whether the claiming widow could recover turned on the question of her dependency.[17]

[16] The Jones Act and the Death on the High Seas Act differ as to geographic coverage and the survival of personal injury actions, and also, important to the present case, as to beneficiaries entitled to recover. The FELA (Jones Act) contains mutually exclusive classes of beneficiaries, while the DHSA does not. Day, "Maritime Recovery," 64 Col. L. Rev. 648, 653 (1964).

[17] Determinating of the "surviving wide" under that Act is a matter of state law "since marital status is ordinarily determined by local law * * *." Arizona Engine and Mach. Works v O'Leary, 328 F.2d 877 (9th Cir. 1964). Under very similar circumstances, Idaho law, which was there applicable, was found to be more favorable to plaintiff than the law of Virginia in this case.

Similarly, Gibson v Hughes, 192 F.Supp. 564 (S.D.N.Y. 1961), is not in point for it concerns a problem of conflict of laws, in a different context.[18] The opinion as a whole, we think, is much more persuasive against the appellant's contention than for it.

There is a certain appeal in the argument of the appellant that if she was actually dependent upon the deceased seaman she should be entitled to recover, especially as there is no other woman claiming as a widow. But the statute does not spread its benefits broadly according to dependency.[19] Relationship is an essential factor under the statute, which speaks of a "surviving widow." Neither express language in the statute nor the term "widow" in its ordinary use qualifies the survivor of a bigamous marriage as a widow. If the statute made only pecuniary loss the test rather than relationship, we would have a different case. In dealing with the rights of illegitimate children, as we have seen in De Sylva and Middleton, discussed above, we find, both under certain state and federal laws, a social attitude more favor-

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[18] "The problem", said the court, "is to determine whether the law governing the marital status of the plaintiff is that of New York or of the District of Columbia, or of French Morocco (the law of France)," 192 F.Supp. at 566.

[19] "The Jones Act * * * explicitly name(s) the widow as beneficiary without reference to her dependency on the deceased * * *." Civil v Waterman S.S. Corp., 217 F.2d 94, 99 (2d Cir. 1954) (dictum); FELA Sec. 51, 45 U.S.C.A. Sec. 51 (1958), provides that only dependent "next-of-kin" shall benefit. The other designated beneficiaries need not prove dependency. See Gilmore & Black, LAW OF ADMIRALTY 307 (1957). In fact, nondependent relatives may recover at the expense of a dependent relative listed in a subsequent class. Whitaker v Blidberg Rothschild Co., 195 F.Supp. 420 (E.D. Va.), aff'd. 296 F.2d 554 (4th Cir. 1961) (nondependent daughter prevented dependent mother from recovering under the Jones Act); The Four Sisters, 75 F.Supp. 399 (D. Mass. 1947) (dependent father precluded recovery for dependent sister)

able than in early English common law; but neither Virginia law nor any federal statute has recognized a right of recovery in a person in the position of this appellant.

Whether it would be sounder social policy to relax the statutory requirement of widowhood by treating the survivor of a bigamous marriage as a widow entitled to recovery is a fairly debatable question. But should such a change in policy be made on judicial initiative? It is one thing for admiralty to fill in the lacunae left by congressional silence; it would be quite another to rewrite the statute. It seems to us that an admiralty court would overstep proper limits if it should attain the result by giving a forced and artificial definition to the well-established term "widow." This would be the case were we to recognize as a wife a woman who goes through a marriage ceremony with a man knowing that he has an undivorced wife in being.

While it is true that in the present instance no other woman is competing with the appellant for a share in the settlement fund, a decision according the appellant standing could operate to the detriment of claimants such as parents or next of kin in future cases.

Emphatically we must decline to accept the appellant's contention that by applying the law of Virginia to interpret the term "surviving widow" in the Jones Act, a federal right is being defeated by the state. There can be no federal right unless the claimant can qualify as a beneficiary under the statute. Under the circumstances this can only be achieved through a lawful marriage as that term is interpreted in the only available domestic relations law—the law of the domicile.

Affirmed.

APPENDIX B

Mary Virginia BELL, Administratrix of the Estate of John Ware Bell, Deceased,
Libellant,

v

TUG SHRIKE, Southern Transportation Company, Inc., Southern Tug Corp., ALLIED CHEMICAL BARGE NO. 1, and ALLIED CHEMICAL CORPORATION,
Respondents.

No. 8053.

United States District Court
E.D. Virginia
Norfolk Division
February 26, 1963

As Amended April 17, 1963.

WALTER E. HOFFMAN, Chief Judge:

The facts of this case are not in dispute. In an action under the Jones Act, 46 U.S.C., Sec. 688, libelant seeks to recover damages for the death of her alleged husband, John Ware Bell, who was a member of the crew of the tug SHRIKE owned by Southern Tug Corporation and operated by Southern Transportation Company, Inc., as charterer thereof, when the vessel capsized and sank on September 12, 1959 resulting in the death of John Ware Bell.

Shortly prior to the date of trial the action was conditionally settled. Certain children had been born of decedent's marriage to Helen Woolard (Bell) and the sum of $15,500.00 was paid to the North Carolina guardian of these children, pursuant to the court's order of October 25, 1960.

The total settlement figure agreed upon, subject to the conditions hereinafter mentioned, was $60,000.00. From this amount the aforesaid sum of $15,500.00 was deducted and paid, leaving in controversy the remaining sum of $44,500.00.

The issue now before the court is whether the libelant, in her own right, is entitled to recover as the alleged widow or common law wife of John Ware Bell. If she is entitled to recover, the remaining balance of said settlement is to be paid to her. If she is not entitled to recover, the case is at an end, as the $15,500.00 has been paid and distributed to decedent's children.

A chronological sequence of the marital life of John Ware Bell will perhaps give a better focus to the problem presented. It is as follows:

Date	*John Ware Bell*
March 16, 1940	Married Helen Woolard
June 12, 1951	Divorced by Helen Woolard Bell
June 19, 1951	Married Catherine Estal Smith
December 13, 1956	Married Mary Virginia White (the libelant)
September 18, 1957	Divorced by Catherine Estal Smith Bell
September 12, 1959	John Ware Bell died

Initially, libelant argued that decedent's marriage to Catherine Estal Smith was not valid because he did not wait until the end of the North Carolina term of court on June 20, 1951, before going through the marriage ceremony and, even if decedent's marriage to Mary Virginia White (the libelant) was illegal, she is a putative widow and, as such, entitled to recover under the Jones Act.

These contentions were substantially abandoned by libelant at the time of final argument. Indeed they must be abandoned as the great preponderance of the evidence supports the view that, under North Carolina law, decedent was free to marry immediately upon the entry of the divorce decree of June 12, 1951. His marriage to Catherine Estal Smith on June 19, 1951, took place in Norfolk, Virginia. While still legally married to Catherine Estal Smith Bell, he illegally married Mary Virginia White at Mathews, Virginia, on December 13, 1956. The following year, on September 18, 1957, decedent was divorced by Catherine Estal Smith Bell in the Circuit Court of the City of Portsmouth, Virginia. Decedent was then free to go through another marriage ceremony with Mary Virginia White and thereby legalize their bonds of matrimony but this event never took place. As far as the record indicates, decedent and Mary Virginia White (Bell) lived together in Virginia as husband and wife from December 13, 1956, until his death on September 12, 1959.

Nor can it be successfully urged that decedent's illegal marriage to Mary Virginia White constituted a putative marriage, defined in law as a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful. Black's Law Dictionary, 3rd Ed. 1933. In one case, Lawson I. United States, 8

F. Supp. 700, District Judge Irving R. Kaufman, now a member of the Court of Appeals for the Second Circuit, sustained the right of a putative wife to recover under the Death on the High Seas Act but this holding was reversed on appeal, Lawson v. United States, 2 Cir., 192 F2d 479, cert. den. 343 U.S. 904, 72 S.Ct. 635, 96 L.Ed. 1323.Cf. Beebe v. Moormack Gulf Lines, Inc., 5 Cir., 59 F.2d 319; Winder v. Consolidated Underwriters, D.C., 25 F. Supp. 451; Tetterton v. Artic Tankers, Inc., D.C. 116 F.Supp. 429. The overwhelming weight of the evidence establishes that Mary Virginia White (Bell) was not the putative wife of the decedent; she knew, prior to her illegal marriage ceremony on December 13, 1956, that decedent was then still married to Catherine Estal Smith Bell. That she did not see fit to enter into another marriage contract with decedent subsequent to September 18, 1957—when the legal impediment had been removed—is to be regretted but it is well settled that the divorce decree does not relate back so as to validate an attempted marriage by one of the parties prior to the rendition of the decree. 55 C.J.S. Marriage Sec. 68; Tetterton v. Arctic Tankers, Inc., supra. As the libelant's oral argument and brief did not urge a recovery on any theory of libelant's status as an alleged putative "wife" or "widow" the facts supporting the court's conclusion that Mary Virginia White (Bell) was not the putative wife of John Ware Bell will not be stated herein. Moreover, the right to recover as the putative widow under the Jones Act has been rejected. See authorities cited infra.

The principal thrust of libelant's case lies in her contention that there is no rival claimant "widow"; that admiralty seeks uniformity in application and that to resort to Virginia law would constitute an unconstitutional delegation by Congress to the several states granting such states the

power to declare and control the rights and liabilities of parties arising out of negligently caused deaths occurring upon navigable waters. It is conceded that Virginia does not recognize common law marriages. The argument is one of interest for students of law but to accept this doctrine would require a reversal of many cases already decided to the contrary by the United States Supreme Court.

When Congress enacted the Merchant Marine Act of 1920, including the Jones Act, the rights and remedies granted to seamen were incorporated by specific reference into similar prior legislation known as the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq. By virtue of this incorporation, the applicable provisions of the F.E.L.A. were made a part and parcel of the Jones Act. Panama R.R. Co. v. Johnson, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748; Boczynski v. Luckenbach S.S. Co., 277 U.S. 220, 48 S.Ct. 440, 72 L.Ed. 860; Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686.

In 1916, four years prior to the adoption of the Jones Act, the Supreme Court, in Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 36 S.Ct. 458, 60 L.Ed. 762, held that since Congress had not defined the various classes of beneficiaries provided for under the F.E.L.A., its intent must be taken to be that federal courts are to look at the domestic relations laws of the states. The Kenney case involved the death of a railroad employee, with one legitimate child and two illegitimate children claiming the recovery. As to the deceased employee, they were all his children and, to this extent, they were not rival claimants. The same argument now advanced with respect to lack of uniformity was urged in Kenney, but the Supreme Court held that it was the intent of Congress to resolve the ques

tion as to who constituted "next of kin" by looking to state law (240 U.S. 493, 494, 36 S.Ct. 458, 460). See also Poff v Pennsylvania R. Co. 327 U.S. 399, 66 S.Ct. 603, 90 L.Ed. 749.

In Panama R.R. Co. v Johnson, supra, the constitutionality of the Jones Act was upheld. In considering the uniform operation of the Jones Act, the Supreme Court said (264 U.S. 392, 44 S.Ct. 396):

> "The asserted departure from the restriction respecting uniformity in operation is without any basis. The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. *The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation*, and neither is nor can be deflected therefrom by local statutes or local views of common law rules." (Emphasis supplied)

From the foregoing it will be noted that, only eight years following Kenney, the Supreme Court recognized the uniformity of operation of F.E.L.A. and the Jones Act.

Federal courts making a determination of the requisite legal status necessary to effect recovery under a number of federal statutes have consistently considered a valid marriage under state law essential, and have turned to the domestic relations law of the states for definitions of such familial status.[1]

[1] See footnote 5, Lawson v United States, 2 Cir. 192 F.2d 479, 481, cert. den. 343 U.S. 904, 72 S.Ct. 635, 96 L.Ed. 1323. Decisions

The argument that a common law wife, not recognized by the laws of Virginia as a "wife", may bring herself within the meaning of a "widow" under the Jones Act merely because there is no rival claimant asserting her right of recovery as a widow, is untenable. If the libelant was not within the class of persons whom Congress intended should be entitled to a recovery for the negligently caused death of a seaman, the fact that she is the only one claiming to be a member of that class does not bring her within it. To so hold would permit any woman, having had illicit relations with a seaman, to maintain an action under the Jones Act under the theory that she is the only person claiming to be a "widow." We do not suggest that this example is applicable to the present set of facts, but where do we draw the line? If the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved. As was said in De Sylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 980, 100 L.Ed. 1415:

> "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.

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under actions involving National Service Life Insurance. Holding to this effect are Castor v. United States, 8 Cir., 174 F.2d 981, cert. den. 338 U.S. 836, 70 S.Ct. 45, 94 L.Ed. 511, reh. den. 338 U.S. 90, 70 S.Ct. 245, 94 L.Ed. 555; Schurink v. United States, 5 Cir., 177 F. 2d 809, cert. den. 339 U.S. 928, 70 S.Ct. 627, 94 L.Ed. 1349; Gelin v. United States, 83 F.Supp. 1003; Cavanaugh v. United States, D.C., 94 F.Supp. 776. Like decisions under War Risk Insurance are United States v. Robinson, 5 Cir., 40, F.2d 14; Schiefer v. United States, 2 Cir., 52 F.2d 527. And under the Longshoremen and Harbor Workers' Compensation Act, Green v. Crowell, 5 Cir., 69 F.2d 762, cert. den. 293 U.S. 554, 55 S.Ct. 88, 79 L.Ed. 656; Bolin v. Marshall, 9 Cir., 76 F.2d 668, cert. den. 296 U.S. 573, 56 S.Ct. 116, 80 L.Ed. 404.

> * * * This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."

To the same effect, see Brantley v Skeens, 195 U.S.App. D.C. 246, 266 F.2d 447; Sears v Austin, 9 Cir., 292 F2d 690, cert. den. 368 U.S. 929, 82 S.Ct. 365, 7 L.Ed.2d 192; Gibson v Hughes, D.C., 192 F.Supp. 564.

Libelant's reliance upon Thompson v Lawson, 347 U.S 334, 74 S.Ct. 555, 98 L.Ed. 733, is misplaced. That was a case under the Longshoremen and Harbor Workers' Compensation Act and may be distinguished as the Act makes its own definition of the word "widow". Resort to state law was wholly unnecessary. The dicta in Thompson tends to support the conclusion that it is limited to claims under the compensation act.

It is said that Congress may not constitutionally delegate power to the states to declare the rights and liabilities arising out of a maritime injury. Southern Pacific Co. v Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834; Washington v W.C. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646. The authorities cited relate to attempts by state legislatures to apply their own workmen's compensation statutes to injuries within the admiralty and maritime jurisdiction. The difficulty with libelant's argument is that the state domestic relations law does not, standing alone, determine whether a claimant in a Jones Act death action is entitled to recover. It is the maritime law of the United States, through the F.E.L.A. as incorporated within the Jones Act, which has been

interpreted by authorize the definition of statutory beneficiaries by reference to state law. There is no admiralty law of domestic relations. The cases of Kossick v United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56, and Union Fish Co. v Erickson, 248 U.S. 308, 39 S.Ct. 112, 63 L.Ed. 261, are inapposite. There are instances in which contracts are within the field of admiralty jurisdiction, but the regulation of such contracts is left with the states. Wilburn Boat Co. v Fireman's Fund Ins. Co., 348 U.S. 310, at p. 313, 75 S.Ct. 368, at p. 370, 99 L.Ed. 337. And, likewise, federal inspection laws have been held to yield to local ordinances invoking smoke control regulations. Huron Portland Cement Co. v Detroit, 362 U.S. 440, at p. 445, 80 S.Ct. 813 at p. 817, 4 L.Ed.2d 852. There can be no doubt as to the constitutionality of resort to the domestic relations laws of the several states in aid of defining statutory beneficiaries in death actions brought under the Jones Act.

Adopting this memorandum in accordance with Admiralty Rule 46½, proctors for the respondent will prepare and present after inspection by opposing proctor, an appropriate decree holding that Mary Virginia White (Bell) is not entitled to any portion of the recovery or settlement occasioned by the death of John Ware Bell, the action will be dismissed. Taxable court costs for instituting the action and for all proceedings to and including October 25, 1960 will be assessed against the respondents. Taxable court costs for proceedings subsequent to October 25, 1960, will be assessed against the libellant.

APPENDIX C

JONES ACT, 46 U.S.C. 688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; *and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007."

FEDERAL EMPLOYERS' LIABILITY ACT
45 U.S.C. 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, *in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or*

husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 364.

MRS. MARY VIRGINIA BELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN WARE BELL, DECEASED,
Petitioner,

v.

TUG SHRIKE, IN REM, SOUTHERN TRANSPORTATION COMPANY INCORPORATED, A CORPORATION AND SOUTHERN TUG CORPORATION, IN PERSONAM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 364.

MRS. MARY VIRGINIA BELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN WARE BELL, DECEASED,
Petitioner,

v.

TUG SHRIKE, IN REM, SOUTHERN TRANSPORTATION COMPANY INCORPORATED, A CORPORATION AND SOUTHERN TUG CORPORATION, IN PERSONAM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, written by Chief Judge Walter E. Hoffman, is reported at 215 F. Supp. 377 (Appendix B of Petition) and the unanimous Opinion of the Court of Appeals for the Fourth Circuit written by Chief Judge Simon E. Sobeloff, affirm-

ing the District Court, is reported at 332 F (2d), 330 (Appendix A of Petition).

JURISDICTION

The jurisdiction of the Court is invoked under *Title 28, United States Code Annotated, Section 1254(1)*, which applies to any civil or criminal case. The question is immediately raised as to whether this section encompasses an admiralty case such as the instant case.

QUESTIONS PRESENTED

The question here presented is twofold in nature and may be stated as follows:

(1) Should the marital status of the petitioner and decedent be determined under the law of the State of Virginia where they were domiciled, where they celebrated their illegal marriage ceremony, where they lived together in adultery for a number of years, and the only state which had any nexus with them; or

(2) Should their marital status be determined under the law of some other state with which they had no nexus but whose law may be more favorable to the petitioner.

STATUTES INVOLVED

The statute here involved is *Title 46, United States Code Annotated, Section 688*, commonly known as the *Jones Act*. However, said statute incorporates therein *Title 45, United States Code Annotated, Section 51, et seq.*, commonly

known as the *Federal Employers' Liability Act*. The beneficiaries under both statutes are the same since the beneficiaries under the *Jones Act* are determined by reference to the *Federal Employers' Liability Act*.

STATEMENT OF THE CASE

Petitioner's statement of the case omits several pertinent facts which should be brought to the attention of this Court.

The decedent, John Ware Bell, married his first wife, Helen Woolard (Bell), on March 16, 1940. After having three (3) children by her, he deserted said wife and children. She secured a divorce from him on June 12, 1951. He then married his second wife, Catherine Estal Smith (Bell), on June 19, 1951. They had no children. He likewise deserted her. While still legally married to Catherine Estal Smith Bell, he *illegally* married Mary Virginia White (Bell) at Mathews, Virginia on December 13, 1956. The marriage certificate issued by the Clerk of the Circuit Court, of Mathews County, Virginia, indicates that the decedent falsely informed the Clerk that he was single and had never been previously married. The petitioner was obviously present when said marriage certificate was issued. The following year, on September 18, 1957, decedent was divorced by his second wife, Catherine Estal Smith Bell, in the Circuit Court of the City of Portsmouth, Virginia. Decedent was then free to go through another marriage ceremony with Mary Virginia White (Bell) and thereby legalize their bonds of matrimony but this they failed to do. As far as the record indicates, decedent and Mary Virginia White (Bell) lived together in adultery at Norfolk, Virginia from December 13, 1956, until decedent's death on September 12, 1959. The overwhelming weight of the

evidence establishes that Mary Virginia White (Bell) was not the putative wife of the decedent. She knew, prior to her *illegal* marriage ceremony on December 13, 1956, that the decedent was then still married to his second wife, Catherine Estal Smith Bell. That she did not see fit to enter into another marriage contract with the decedent subsequent to September 18, 1957, when the legal impediment had been removed, is to be regretted but it is well settled that the divorce decree does not relate back so as to validate an attempted marriage by one of the parties prior to the rendition of the decree. 55 C. J. S., "*Marriage*," sec. 68; *Tetterton* v. *Arctic Tankers, Inc.*, 116 F. Supp. 429.

The foregoing facts were, for the most part, recited from the Memorandum Opinion of District Judge Hoffman, found on pages 31 and 32 of Appendix B of the Petition.

Thus the testimony accepted by the District Court and later by the Circuit Court of Appeals was that the parties were at all times domiciled in the State of Virginia that they celebrated their illegal marriage ceremony in the State of Virginia, that they lived in adultery for a number of years in the State of Virginia, that the decedent died in the State of Virginia, and that they never cohabited, as purported husband and wife, in any other state. Under such circumstances the District Court and the Circuit Court of Appeals felt compelled to apply the law of the State of Virginia in determining the marital status of the parties. Since the State of Virginia does not recognize common law marriages, both the District Court and the Circuit Court of Appeals ruled that the petitioner was not the wife, and consequently is not the *surviving widow*, of the decedent. In

spite of said rulings the petitioner continues to refer to herself as the Widow Bell which is nothing more than an attempt to create sympathy for her claim.

REASONS FOR REJECTING THE WRIT

(a) *Legislative Intent*

The problem of what law governs the petitioner's marital status lies at the threshold of this case. Congress might have chosen to spell out the answer to the problem in the *Federal Employers' Liability Act*, and had it done so, the problem could be determined from the statute itself. But it did not choose to do so, and therefore, the District Court and the Circuit Court of Appeals had to decide what law should be applied.

One solution is to view the question as one of federal law since a purely federal right is involved. This, the petitioner urges. But it would not be appropriate here. While a federal right is involved, the statute deals with a familial relation. There is no federal law of domestic relations, which is primarily the concern of the locality. In *De Sylva v. Ballentine*, (S.Ct., 1956) 351 U.S. 570, 76 S.Ct. 974, Mr. Justice Burton, speaking for this Court, in a case involving the *Federal Copyright Act* stated in *76 S.Ct. at page 980*:

> "We come, then, to the question of whether an illegitimate child is included within the term 'children' as used in § 24. The scope of a federal right is, of course, a federal question, *but that does not mean that its content is not to be determined by state, rather than federal law*. Cf. Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed.

1172; Board of County Commissioners v. United States, 308 U.S. 343, 351-352, 60 S.Ct. 285, 288-289, 84 L.Ed. 313. *This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.*"

De Sylva v. *Ballentine, supra*, eliminates federal law in favor of local law. It thus becomes necessary to determine what local law is to be applied. The respondents believe that the law of the State of Virginia should be applied because this is the only state that had any nexus with the parties.

The normal conflicts rule is that the marital status of the parties shall be determined by the law of the place where the marriage was contracted, or in the alternative, the law of the domicile of the contracting parties. In the instant case, these two places coincide in the State of Virginia. Therefore, the appropriate law, in the conflicts sense, would be the law of the State of Virginia. The District Court and the Circuit Court of Appeals applied the law of the State of Virginia.

The petitioner recognizes that the law of the State of Virginia would ordinarily be applied in determining her marital status. However, she urges that the appropriate law of domestic relations should be applied only when and to the extent that such law harmonizes with what she believes to be the legislative intent of the *Federal Employers' Liability Act*, namely, a uniform application of the term *surviving widow* throughout the fifty states. The petitioner seeks to establish what she believes to be said legislative intent by citing from the Congressional Record,

April 2, 1906, at pages 4602 and 4604. This was an exercise in futility since the Congressional Record so cited is completely silent with respect thereto.

Directly to the point is the decision of this Court in *Seaboard Airline Railway Company* v. *Kenney*, (S.Ct., 1916) 240 U. S. 489, 36 S.Ct. 458. Therein this Court sought, found and determined said legislative intent. Mr. Chief Justice White, speaking for the entire Court, in *36 S.Ct., at page 460*, said:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed *it would seem to be clear that the absence of a definition in the Act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law.*"

Seaboard Airline Railway Company v. *Kenney*, *supra*, was recently reaffirmed by this Court in *Poff* v. *Pennsylvania Railroad Company*, (S.Ct., 1946) 327 U.S. 309, 66 S.Ct. 603, wherein the question of beneficiaries under the *Federal Employers' Liability Act* was also involved. Mr. Justice Douglas, speaking for this Court, in *66 S.Ct., at page 605*, said:

> "****It is clear that 'next of kin' is determined by state law, Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 36 S.Ct. 458, 60 L.Ed. 762. *State law governs whether it is necessary to determine if one relative is*

*closer than another, or if a claimant falls within or without the class. *****"

See also, *Hammond v. Pennsylvania Railroad Company*, (S.Ct. N.J., 1959) 31 N.J. 244, 156 A. (2d) 689, 1960 AMC 973, which likewise involved the determination of beneficiaries under the *Federal Employers' Liability Act*. Therein, at *page 974 (1960 AMC)*, Chief Judge Weintraub said:

> "Defendant urges that who are 'children' must be determined by state law. In Seaboard Airline Railway v. Kenney, 240 U.S. 489 (1916), the Court, faced with the question whether 'next of kin' in this statute (1) required the uniform application of its common-law meaning or (2) embraced current definitions of the term under the law of the state concerned, accepted the latter proposition. This view was reaffirmed in Poff v. Pennsylvania Railroad Company, 327 U.S. 300 (1946). *The holding would seem to apply with equal force to 'widow' and 'husband', since these terms, like 'next of kin', involve a status ascertainable only by reference to some rule of law.* ****"

The foregoing cases clearly indicate the intent of Congress to apply state law in the determination of familial relationships arising under the *Federal Employers' Liability Act*. The state law to be applied must be the law of the state which created such relationship. The law of the State of Virginia created the *alleged* relationship existing between the petitioner and the decedent. Therefore the law of the State of Virginia is decisive in the determination of that relationship. That law indicates that the petitioner and the

decedent were *illegally* married and for that reason she was not the wife of the decedent, nor is she his *surviving widow*.

The petitioner is unwilling to accept the doctrine enunciated in *Kenney, supra, Poff, supra,* and *De Sylva, supra,* because the net result thereof is not beneficial to her. She urges that this Court should apply the *common law*. She does not direct this Court's attention to any principle of conflicts which would justify this Court in ignoring the law of the State of Virginia in favor of the common law. She merely points to the law of those states, other than Virginia, which recognizes common law marriages, or in the alternative the American common law, or in the further alternative the English common law as it existed at the time of the separation from the mother country, and requests that such law be applied, *if favorable to her*.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on pages 20 and 21 of Appendix A of the Petition, aptly disposed of said contentions in the following language:

> "****It would at best be illogical to disregard the state law which under accepted principles of conflicts of law would apply, merely because the law of some other place, unrelated to the parties and to the subject matter, happens to afford one in the appellant's position more favorable treatment. If the Court, in the absence of an admiralty rule or policy, is to look to some source other than the law of Virginia, we think that it would have to be the American common law; but to say that would really not contribute to a practical solution here since the 'common law' has been variously interpreted by judicial decision.

> If we inquire into the law of marriage and divorce under the law of England as it existed at the time of the separation from the mother country,' Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 494 (1916), in an effort to discover a common law which might be applied, the result is no more favorable to appellant than the law of Virginia.****"

Petitioner's last mentioned contention was overruled by this Court in *Seaboard Airline Railway Co. v. Kenney, supra*, which as we have already pointed out was a *Federal Employers' Liability Act* case, wherein this Court, in *50 S.Ct., at page 460*, said:

> "****But, it is urged, as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common-law significance, and therefore as excluding all persons not included in the term under the common law; meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally ap-

parent by considering the far-reaching consequence of the proposition, since, if it be well founded, it would apply equally to the other requirements of the statute, — to the provisions as to the surviving widow, the husband and children, and to parents, thus, for the purposes of the enforcement of the act, overthrowing the legislation of the states on subjects of the most intimate domestic character, and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended, since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the states, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.

But we need go no further, since the want of merit in the contention is fully demonstrated by authority. ****"

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on page 22 of Appendix A of the Petition, had this to say with reference to petitioner's contention that uniformity will be achieved by an application of the common law:

"*****Further, if admiralty does indeed favor uniformity, this end is no better achieved in cases like ours by looking to a federal judge's interpretation of the common law than by relying upon the domestic relations laws of the states in which the parties are domiciled."

(b) *Other Beneficiaries May Be Effected*

The petitioner urged before the District Court, and also before the Circuit Court of Appeals, that she be accorded the status of a *surviving widow* since she is the only claimant of the settlement fund.

This Court must of necessity decide this case in the light of its effect on future cases. It should be remembered that the death provisions of the *Federal Employers' Liability Act* establish three mutually exclusive classes of beneficiaries: recovery in the first instance is for the benefit of the surviving spouse and children; only if there are none may there be recovery for the benefit of surviving parents; only if there are neither spouse and children nor parents, may there be recovery for dependent next of kin. Thus, the presence of a surviving widow, whether she be statutory or common law, precludes recovery by a mother and father or dependent next of kin. If this Court accords the petitioner, who is nothing more than the survivor of a bigamous marriage, the status of a surviving widow then it would, at the same time, be according like status to all such persons in future cases to the possible detriment of parents and next of kin therein.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on page 28 of Appendix A of the Petition, recognized this problem and disposed of same in the following language:

> "While it is true that in the present instance no other woman is competing with the appellant for a share in the settlement fund, a decision according the appellant standing could operate to the detriment of

claimants such as parents or next of kin in future cases."

District Judge Hoffman, in his Memorandum Opinion, found on page 35 of Appendix B of the Petition, disposed thereof as follows:

> "The argument that a common law wife, not recognized by the laws of Virginia as a 'wife', may bring herself within the meaning of a 'widow' under the Jones Act merely because there is no rival claimant asserting her right of recovery as a widow, is unfenable. If the libelant was not within the class of persons whom Congress intended should be entitled to a recovery for the negligently caused death of a seaman, the fact that she is the only one claiming to be a member of that class does not bring her within it. To so hold would permit any woman, having had illicit relations with a seaman, to maintain an action under the Jones Act under the theory that she is the only person claiming to be a 'widow.' We do not suggest that this example is applicable to the present set of facts, but where do we draw the line? If the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved."

Therefore, this Court should decline to accept petitioner's contention that a woman, who goes through a marriage ceremony with a man knowing that he has an undivorced wife in being, should be accorded the status of a surviving

widow merely because she is the only claimant to the settlement fund.

(c) *Putative Widow*

The petitioner urged before the District Court, and also before the Circuit Court of Appeals, that she be accorded the status of a *putative widow*. However, the evidence adduced before the District Court on December 21, 1961, and subsequent dates, failed to sustain her position.

A *putative widow* is one who contracts a marriage in good faith and in ignorance that an impediment exists that renders it unlawful. Therefore, the petitioner occupies the status of a *putative widow* only if she contracted her marriage with the decedent in good faith and in ignorance that he was still married to his second wife.

District Judge Hoffman, after hearing the evidence, decided that the overwhelming weight of said evidence established that the petitioner was not the putative wife of the decedent. District Judge Hoffman's Memorandum Opinion with respect thereto, found on page 32 of Appendix B of the Petition, reads as follows:

> "The overwhelming weight of the evidence establishes that Mary Virginia White (Bell) was not the putative wife of the decedent; she knew, prior to her illegal marriage ceremony on December 13, 1956, that decedent was then still married to Catherine Estal Smith Bell. ***"

Thus, District Judge Hoffman found that the petitioner

was not the putative wife of the decedent and based his finding with respect thereto upon the following testimony:

JOSE FRANQUEZ KAMMINGA, SWORN

* * *

(Tr. 109, 110)

"Q. All right. Now, during your conversation with Mrs. White and Mr. Bell—was that in 1956?

A. Yes, sir, in 1956.

Q. And was it prior to December of 1956?

A. No, sir. This is around about February or March.

Q. Of '56?

A. Of '56.

Q. So it was prior to December, '56? It was before December, '56?

A. Before December, yes sir.

Q. Now, at the time that you had your conversation with Mrs. White and Mr. Bell about you moving out, was any mention made about his divorce at that time? And if so, tell us about that."

* * *

(Tr. 111-112)

"Q. Tell us the entire conversation.

A. Well, when she mentioned to me that she was getting a divorce from her husband and that Johnny was getting a divorce from his wife, I told her—I said, 'Well, I imagine you and him are going to get married.' She said, 'Well, I hope so, because he's very

good to me,' and I always appreciate people when they say they're good because he is good, and I just say, 'Well, good luck,' and that's all.

Q. This was all in 1956?

A. Yes, sir.

Q. And when Mrs. White said that Johnny was getting a divorce from his wife, to what wife was he referring—I mean was she referring do you know that?

A. She was referring to Catherine."

* * *

CATHERINE ESTAL REYNOLDS, SWORN

* * *

(Tr. 60, 61)

"Q. Now, you have mentioned calling him at one time at the Duncan Avenue address. Did you ever call him at any other address?

A. Yes. They were living out on—it's something like Moran, but it's not Moran. He was there and I called—

Q. Was it Marne, M-A-R-N-E?

A. That was it. Like I say, it was something like Moran. I called and a woman answered, and I asked her who was speaking and she said it was Mrs. White, and I asked her then was Johnny home, and she said, 'No,' and I told him—I told her who I was and what I wanted, and she said, 'Well he's not home now and dial—' —I don't remember whether she told me when

he'd be home or not, but I called back again, and he was home and I asked him then, would he give me a divorce.

Q. Before we get to that, let me ask you this: When you called and talked to the lady who identified herself as Mrs. White, you said you told her what you wanted. What did you tell her?

A. I told her I wanted to talk to my husband about the divorce, about giving me a divorce. She said, 'Well, aren't you divorced?' I said, 'No, he won't give me one.'

Q. All right. Can you tell us when that was?

A. It was sometime the last part of October or the first part of November.

Q. '56?

A. '56.

THE COURT: What year?

Q. (By Mr. Sykes) And you finally secured your divorce in September, '57?

A. Yes, sir.

* * *

The foregoing testimony of *Jose Franquez Kammingo* and *Catherine Estal Reynolds* clearly indicates that the petitioner knew or should have known that the decedent was still married to his second wife when the petitioner married him on December 13, 1956.

However, even if this Court were to determine that the petitioner is a *putative widow*, which it should not do, then this Court must go one step further and determine that as

such, she is within the term *surviving widow* used in the *Federal Employers' Liability Act*.

That the petitioner must have been lawfully married to the decedent under appropriate state law in order to qualify as a *surviving widow* is amply supported by text authorities and reported cases.

Thus, in the text book *Maritime Injury and Death by Paul S. Edelman (1960)*, the author makes the following statement at page 134:

> "A 'widow' under the Jones Act must be lawfully married under state law. A woman believing herself lawfully married may have some rights under state law, but will not be considered a widow under the Jones Act."[18]
>
> [18] "*Beebe* v. *Moormack Gulf Lines, Inc.* (C.C.A. 5th 1932) 59 F. 2d 319 ('putative' wife under Louisiana law, innocently believing herself to be lawfully married to one already married, held not to be a widow under the Jones Act)."

The Court's attention is directed to the case of *Beebe v. Moormack Gulf Lines, Inc.* (C.C.A. 5, 1932) 59 F. 2d 319, cert. denied, 287 U.S. 597, 53 S.Ct 22, 77 L.Ed. 520, which is cited in the above text. Therein Knighton was employed as an oiler in the engine room of a ship, and was killed on navigable waters through the negligence of the ship's owners. He was survived by a wife, child and mother who lived in Arkansas, and also by Marian Beebe, with whom he had gone through a marriage ceremony in Louisiana some weeks before his death, and with whom he had since lived in New Orleans, supporting her as his wife,

she not knowing until after his death of his prior marriage. The ship's owners settled with Knighton's administrator with respect to the claims of his wife, child and mother. The claim of Marian Beebe was not recognized, and a libel in personam under the *Jones Act* was brought for her benefit setting up all these facts. The libel was dismissed for want of a cause of action and an appeal was taken. The Appellate Court affirmed the judgment of the District Court. Circuit Judge Sibley, speaking for the Court, at page 320, said:

> "The rights of the putative wife are exceptional, and she has none beyond those specially granted. While the law, on account of her good faith, shields the putative wife from shame and protects her in her rights of property, she is not included in the terms 'widow' and 'wife', which necessarily imply a lawful marriage. ***This court held in United States v. Robinson, 40 F. (2d) 14, that a putative wife under the law of Louisiana is not a 'spouse' under the act of Congress relating to war risk insurance (Section 22, as added by Act Oct. 6, 1917, Sec. 2 (40 Stat. 400), and amended by Act Dec. 24, 1919, Sections 2-4 (41 Stat. 371), and Section 402, as added by Act Oct. 6, 1917, Sec. 2 (40 Stat. 409)). The reasoning in that case holds good in this. Judgment affirmed."

The leading case on the question here under discussion is *Lawson* v. *United States*, (C.C.A. 2, 1951) 192 F. 2d 479, cert. denied, 343 U.S. 904, 72 S. C. 635, 96 L.Ed. 1323. Therein, the litigation resulted from a collision on the high seas between two vessels owned by the United States. The collision caused the death of two seamen whose administrators brought suits under the applicable federal

statute, *Title 46, United States Code Annotated, Section 761, et seq.* The final decree entered in the litigation awarded Lawson, Administrator of seaman Cardenas, $2,000.00 for the benefit of Paula Liendo and $13,250.00 for the benefit of Antonia Martinez. The United States appealed from that part of the final decree which made an award for the benefit of Antonia Martinez who was a *putative wife*. The appeal was heard by Chief Judge Thomas W. Swan, Circuit Judge Jerome N. Frank and Circuit Judge Charles E. Clark. Chief Judge Swan wrote the opinion for the Court and, at page 480, 481 thereof, said:

> "In holding that Antonia, who innocently went through a marriage ceremony with Cardenas when he had a legal wife living and undivorced, was also a 'wife' within the meaning of the statute, the district court relied upon this court's decision in Middleton v. Luckenbach S. S. Co. It was there held that an illegitimate child could be considered a 'child' and his mother a 'parent' within the meaning of this statute. We think the implication of that case is adverse rather than favorable to Antonia's claim to be a 'wife'. In common parlance an illegitimate son or daughter is called the 'child' of its mother and the mother the child's 'parent'. But the common meaning of 'wife' is legal wife; *and a bigamous marriage does not make the defrauded and innocent woman a 'wife' in common parlance.* The problem, of course, is to determine what meaning the legislators intended (or may be assumed to have intended) to ascribe to the word 'wife'. And we see nothing to suggest that they used the word in other than its normal meaning, or intended that a man could have two or more wives all recovering at once

under this statute. While the question under the Death on the High Seas Act appears to be one of first impression, analogous decisions under similar state and federal statutes support the view above expressed."[5]

[5] "The words 'wife' or 'widow' in federal statutes are almost universally interpreted to include only the legal wife. Decisions under National Service Life Insurance so holding are: Castor v. United States, 8 Cir., 174 F. 2d 481; Schurink v. United States, 5 Cir., 177 F. 2d 809; Gehm v. United States, D.C.N.Y., 83 F. Supp. 1003; Cavanaugh v. United States, D.C.Mo., 94 F. Supp. 776; under War Risk Insurance: United States v. Robinson, 5 Cir., 40 F. 2d 14 (interpreting the word 'spouse'); cf. Schiefer v. United States, D.C.N.Y., 52 F. 2d 527 (where there is strong dicta that the putative wife was the legal wife—the case, however, contained an element of estoppel against the legal wife); under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 901 et seq.: Bolin v. Marshall, 9 Cir., 76 F. 2d 668, certiorari denied, 296 U.S. 573, 56 S.Ct. 116, 80 L.Ed. 404; Green v. Crowell, 5 Cir., 69 F. 2d 762, certiorari denied, 293 U.S. 554, 55 S.Ct. 88, 79 L.Ed. 656; *under the Jones Act*, 46 U.S.C.A. Sec. 688, and the *Federal Employers' Liability Act*, 45 U.S.C.A. Sec. 51 et seq; *Beebe v. Moormack Gulf Lines, Inc.*, 5 Cir., 59 F. 2d 319, certiorari denied, 287 U.S. 597, 53 S.Ct. 22, 77 L.Ed. 520 (*this despite the fact that under Louisiana Law the putative wife had certain rights against the man's estate*); Meisenhelder v. Chicago & N.W. Ry. Co., 170 Minn. 317, 213 N.W. 32, 51 A.L.R. 1408; In re Tufts' Estate, 228 Wis. 221, 280 N.W. 309; Howes v. Pere Marquette R. Co., 28 Ohio App. 297, 162 N.E. 675."

The foregoing authorities clearly indicate that the term *surviving widow* necessarily implies a lawful marriage. Therefore, even if the petitioner is considered a *putative wife*, she is not entitled to recover under the *Jones Act*.

(d) *Common Law*

The petitioner argues, on page 10 of her Petition, as a proposition of law, that upon removal of the existing impediment, by Catherine's divorce in 1957, the petitioner and the decedent, by their continued cohabitation, entered into a valid common law marriage as a result of which she should be considered the *surviving widow* of said decedent.

There is one important exception to the proposition of law stated by the petitioner which the petitioner has failed to call to the attention of this Court. In Volume 35, *American Jurisprudence*, pages 312, 313, under the subject *Marriage* the following exception to said proposition of law is noted:

> "§ 201—After Removal of Impediment To Marriage— * * * * Of course, *in those jurisdictions wherein common-law marriages are not valid, no presumption or inference of marriage can arise from habit and repute after the removal of an impediment.*"

The above-mentioned exception was applied in the case of *Tetterton v. Arctic Tankers' Inc., et al.*; (D.C. E.D. Pa., 1953) 116 Fed. Supp. 429. Therein Maria Tetterton, Administratrix of the Estate of Fenner Tetterton, who was also his alleged widow, brought suit under the "Death on the High Seas Act" to recover damages for the death of her decedent. Maria first met Tetterton in the

early part part of 1943. At that time she had a husband, a man named Bochiccio, whom she had married a few months before she met Tetterton, but who had been sent to jail for some offense which he had committed shortly after her marriage to him. In June of 1943 Tetterton telephoned Maria from Florida and told her "You don't really have to be married down here to live as husband and wife". As a result of this conversation Maria went to Florida and entered into some kind of compact with Tetterton. She lived with Tetterton, as husband and wife, in Florida and then moved with him to New York where they continued to live as husband and wife until the date of his death. While living in New York as husband and wife she obtained an annulment of her marriage to Bochiccio. The District Court had to decide whether Maria should be considered as the *surviving widow* of the decedent under the provisions of the "Death on the High Seas Act". Chief Judge Kirkpatrick heard the case and decided that *she was not the surviving widow of the decedent* under the provisions of said act and consequently allowed her no recovery. At page 432, Chief Judge Kirkpatrick said:

> "The difficulty with the libellant's position in this respect is that when the impediment was removed she was, and has been ever since, domiciled in New York and New York does not recognize the validity of a common-law marriage entered into in that State since 1933. There is no proof that Maria and Tetterton were domiciled at any time in any state which permits common-law marriages. *Virginia, where she and Tetterton visited his relatives, does not.*"

The language in *Tetterton v. Artic Tankers, supra*, above quoted, applies equally as well to our instant case.

> "The difficulty with Widow Bell's position in this respect is that when the impediment was removed, she was, and has been ever since, domiciled in Virginia and Virginia does not recognize the validity of a common-law marriage entered into in that State. There is no proof that Widow Bell and John Ware Bell were domiciled at any time in any state which permits common-law marriages."

The fact that the State of Virginia does not recognize common law marriages is well settled and not open to dispute. Thus in *National Union Fire Insurance Co. v. Britton* (D.C.D.C., 1960) 187 Fed. Supp. 359, District Judge Holtzoff, at page 364, said:

> "This precise situation was presented in Travers v. Reinhardt, 205 U.S. 423, 430-440, 27 S.Ct. 563, 51 L.Ed. 865. In that case the couple proposed to enter into a common-law marriage in Virginia. *As the State of Virginia did not recognize such marriages, this contractual relation was not valid.*"

See also *Offield v. Davis* (S. Ct. Va., 1902) 100 Va. 250, 263, 40 S.E. 910 wherein the Court at page 263 said:

> "We are therefore of opinion that the enactment of that statute wholly abrogated the common law in force in this State on the subject of marriages, and that no marriage or attempted marriage, if it took place in this State can be held valid here, unless it has been shown to have been under a license, and solemnized according to our statutes".

District Judge Hoffman, in his Memorandum Opinion, found on page 33 of Appendix B of the Petition, had this to say with reference to the above-mentioned proposition of law advanced by the petitioner:

> "It is conceded that Virginia does not recognize common law marriages. The argument is one of interest for students of law but to accept this doctrine would require a reversal of many cases already decided to the contrary by the United States Supreme Court."

(e) *Errata*

The petitioner has been guilty of numerous errors in her Petition, a few of which, we believe, should be called to the attention of the Court. The page references are to pages of the Petition.

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The petitioner states that the decision of the Circuit Court of Appeals conflicts in principle with the purpose and intent of the *Loans Act* and with the *decisions* of this Court. However, she fails to cite any case from this Court which indicates such conflict. The respondents, on the other hand, have cited *Kenney, supra, Poff, supra,* and *De Sylva, supra,* which indicate that no such conflict exists.

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The petitioner states that the case of *Travers* v. *Reinhardt*, 205 U.S. 423, 27 S.Ct. 563, 51 L.Ed. 865, recog

nizes common law marriage. What the petitioner fails to state is that the Court therein held that cohabitation of the parties in the State of Virginia failed to establish a common law marriage, that cohabitation of the parties in the State of Maryland failed to establish a common law marriage and that only their cohabitation in the State of New Jersey, which then recognized common law marriage, justified their recognition as husband and wife.

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The petitioner states that according to the common law of England, existing in the Colonies at the time of the American Revolution, consenstial marriages were valid. The thrust of this statement is that the common law of England, existing in the Colonies at the time of the American Revolution, should be applied in the instant case in order to obtain uniformity. This Court disposed of this argument in *Seaboard Airline Ry. Co. v. Kenney, supra*, wherein it said that in order to accept this argument it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity on many others. Therein, this Court refused to accept said argument.

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The petitioner states that both the District Court and the Circuit Court of Appeals regarded the parties as married at common law from the date of the removal of the impediment until decedent's death some two years later. *This is not true.* Said Courts refused to recognize the parties as married at common law because the law of the State of Virginia does not recognize common law marriage.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on pages 17 and 18 of Appendix A of the Petition, disposed of this contention as follows:

> "The appellant maintains that, although her marriage to Bell was bigamous, a valid common-law marriage was created once the impediment of the prior existing marriage was removed by divorce in 1957. The District Court disagreed, reasoning that because '(t)here is no admiralty law of domestic relations,' a federal court sitting in admiralty must look to state law to define statutory beneficiaries under the Jones Act. Bell v. Tug SHRIKE, 215 F.Supp. 377, 381 (E.D. Va. 1963). Virginia law does not recognize common-law marriages. On that basis the appellant was denied recognition as the surviving widow."

Page 10

The petitioner states that upon the removal of the impediment and continued good faith cohabitation as husband and wife, a common law marriage is deemed to exist, since marriage is preferable to concubinage. We have heretofore directed this Court's attention to the exception thereto, namely, that in those jurisdictions where common law marriages are invalid, no presumption or inference of marriage can arise from habit and repute after the removal of an impediment. *Volume 35, American Jurisprudence*, pages 312, 313.

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The petitioner states that her marriage to the decedent could not be meretricious since her intent to enter into a

legal and honorable state of matrimony is evidenced by her public act of securing a Virginia marriage license and being ceremoniously married. Any such alleged intent is overcome by the fact that she knew that decedent was still married to his second wife at the time of said ceremony. District Judge Hoffman determined that the petitioner knew, prior to her illegal marriage ceremony on December 13, 1950, that decedent was still married to his second wife, Catherine Estal Smith Bell. The honorable state of matrimony can never be entered under such circumstances.

CONCLUSION

The District Court and the Circuit Court of Appeals decided that petitioner's marital status must be determined under state law, and in particular, under Virginia law. Thereunder she is not a *statutory widow*, is not a *putative widow*, and is not a *common law widow*. Therefore, she is not entitled to recover as a *surviving widow* under the Jones Act.

This Court, no less than the Circuit Court of Appeals, is duty bound to observe the language of *McAllister v United States*, (S.Ct., 1954), 348 U.S. 19, 75 S.Ct. 6, wherein Mr. Justice Minton, speaking for this Court, in 75 S.Ct. at page 8, said:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous."

On the entire record in this case, it cannot be said that the District Court and the Circuit Court of Appeals were

clearly erroneous. Therefore, the Petition should be dismissed, and the Writ of Certiorari should be denied.

Respectfully submitted.

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